1943

File No. C Merchand Marks / 43.

Legal Department

A - BRANCH

Subject:- Opinions under the Indian Merchandise Marks Act, 1889

P-8/E

C Merchand Marks / 43

185

Contents.

Legal Department File No. O. ~~Merchandise~~ Merchandise Marks ~~Act, 1889.~~ /1943.

Sr. No.	Compilation No.	Subject	Pages.
		Opinions under the Indian Merchandise Marks Act, 1889.	
1.	O.No. 1167 15-2-43	Question whether the use of Miranda's bottles is illegal.	1 - 2
2.	O.No. 1496 29-2-43	Section 6 only - Question whether the Austrilian Dairy Co., Bombay can be prosecuted for using a false description.	3 - 6
3.	P.& S.D. Extract. O.No. 4484 34-B. 14-5-1943.	Copy of letter to the G. of I. Ref false trade description used by the Austrilian Dairy Co.	8 - 9.

NKS 2417

PMK 2417

The view of the Under Secretary, R.D. that the Indian Patents and Designs Act, 1911, would not apply is correct. He is also correct in His view that no civil action would lie. But an offence under the Indian Merchandise Marks Act, 1889, appears to have been committed. Section 5(1)(e) states that a person shall be deemed to apply a trade description to goods who -- encloses --- any goods ----- in any covering ---- to which a trade description has been applied. By sub-section (3) the term "covering" includes any bottle. Section 6 then provides that if a person applies a false trade description to goods, he ~~shall~~ shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be punished with imprisonment for a term which may extend to three months or with fine which may extend to two hundred rupees, and in case of a second or subsequent conviction with imprisonment which may extend to one year, or ~~xxxxxx~~ with fine, or with both. That section would obviously not apply since there is in this case no intention to defraud. Section 7 then provides:

"If a person sells, or exposes or has in possession for sale or any purpose of trade or manufacture, any goods or things to which a false trade description is applied, he shall, unless he proves -

(a) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason

no reason to suspect thegenuineness of the trade description, and

(b) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods xx or things, or

(c) that otherwise he had acted innocently, be punished with impresonment for a term which may extend to three months, or with fine which may extend to two hundred rupees, and in case of a second or subsequent conviction with impresonment whichmay extend to one year, or with fine, or with both." The question that arises is whether the Nasik Distellery could prove that it acted "innocently". There is an English case stone v. Burn 1911 I.K.B. 927 on all fours with the present case. There xx it was held that the bottler had not acted innocently. A rather special meaning was attachedto the term "innocently". But theauthority of Stone v. Burn never seems to have been doubted and is still good law. The relevant provisions of the Indian Merchandise Act and the English Merchand Act, 1887, are materially the same. An Indian Court would almost certainly feel itself xxxx bound to give the same interpretation to 'innocently' as was give in Stone v. Burn. A copy of the judgment of Alverstone C.J. in that case is enclosed. The judgments of the other two judges were in agreement. The use of Mirandas' bottles therefore seems illegal.

Id/- P.N.M.

15/2

Remembrancer of Legal Affairs.

U.R. to R.D. No. 1167, dt. 15-2-43.

Office of the R.L.A.

The first question for the Remembrancer of Legal Affairs' consideration is, whether the Australian Dairy Company, Bombay, which is manufacturing and selling butter under a trade description which includes the words "Lion-Brand Australians's Creamery Butter" can be prosecuted under sections 6 and 7 of the Indian Merchandise Marks Act, 1889 for using a false trade description.

2. "Trade description " as defined in section 2(2) of theIndian Merchandise Marks Act, 1889, "means any description, statement or other indicatio direct or indirect (a) ..... (b) as to the place or country in which, or thetime at which, any goods were made or produced, or (c) as to the mode of manufacturing or producing any goods, or (d) as to the material of whichm any goods are composed, or (e) ..... and the use of any numeral, word or mark which according to the custom of the trade is commonly taken to be an indication of any of the above matters shall be deemed to be a trade description within themeaning of this Act." The Government of India in their letter at page 1 of the papers object to the use of the word "Australian" and take the viewthat the label containing that word amounts to a false trade description. The adjective "Australian" used in conjunction with butter would indicate eithert hat thebutter was made in Australia or that its composition or mode of manufacture was similar tothat of australian butter. "False trade description" is defined in Section 2(3) of the Act as a trade description which is untrue in a material respect as regards the goods to which it is applied. It may well be that the

that the application of the adjective Australian to thebutter in question would amount to a false trade description. Howevert he word on the label is not "Austrelian tnxthe but "Australian's." That in the context can only mean creamery butter of the Australian Dairy Company. It seems that this Company was established some 35 years ago and has been using the same name and the same lebel for that period. The Company could well contend that it has earned the right to refer to itself by the shortened title, Australian's". No other reasonable meaning can be given to the word in question. Further although the Company styles itself the Australian Dairy Company the lebel makes it quite clear that it is a Bombay Companywith its factory at Chaklasi in Kaira District. Futner over the words "Lion -Brand AaAustralian's Creamery Butter" there is a superscription "manufactured in India". In the face of the clear wording it is we ling impossible to spell out an intention to defraud the public nor does these does there appear any likelihood of the public being deceived. The Remembrancer of Legal Affairs istherefore unable to share the Central Government's opinion that the label amounts to a falsetrade description. That opinion seems

~~to be based on the impropriety of using the word~~

That opinion seems to be based on the impropriet of using the word "Australian". It is not clear whether the Central Government has considered that the word used is not "Australien" but "Austalian's" In the circumstances it would be advisable in this case to fix inform the Governme t of India that in our ppinion no good case has been made out for prosecuting the Compeny under the Indian Merchandise Marks Act, 1889.

3. The second question is regarding the prosecuting agency in cases under the Indian Merchandise Marks Act. It is not quite clear whether the departtment wished to know which Provincial Officer is to institute the proceedings in this case or whether it questions the corr ectness of the Provincial Government's rather than the Central Government's paying the costs of prosecutions in such cases. In view of the answer given to the first question it seems unnecessary for the moment to consider the second question.

Id/- P.M.M.
26/2

Remembrancer of Legal Affairs.

U.R. to P.& S.D., No. 1496 dated 27th February 1943.

I think on legal grounds this is not a strong case for prosecution. My opinion on that point h has alreadybeen stated and I see no reason to modify it. It seems t o me very unlikely that a court would hold thatthe general get up oft he lable is such as t o justify the conclusion thatt he Australian Diary Company, Bombay had used a trade description false in material particulars and calculated t o mislead unwary customers. There may be grounds otherthan legal which justify a prosecution but that is a matter for P.& S.D. to consider.

2. Should P. & S.D. decideto prosecute on administrative grounds, the Director of Industries may be instructed by executive order to lodge a complaint in consultationwith t he Public Prosecutor concerned. The complaint may be lodged at either Kaira or Bombay. The general question of costs and t he prosecuting agency in cases conducted in Bombay courts att he instance oft he Central Governme t has arisen in connection with several Central Acts and it has not yet been finally settled. Probably P.& S.D. do not wish to agitate thog eneral question in this case. The accompanying copies oft wo letters oft he Government of India and one of t he Bombay Government on this question in regardt o Income-tax cases may be of some assistance in determining whether or not to ask theCentral Government to reimburse t his Government for the expenses of t his particular case.

Id/- P.N.M
14/4
Remembrancer of Legal Affairs.

R. R. to P.&S.D.No. 2730dt. 14-4-1943.

Confidential. No.4484/34-B.

Political and services Department.
Bombay Castle, 14th May 1943.

From
Dr. H.T. Sorley, CIE.,ICS.,
Chief Secretary to the Government of Bombay,
Political and Services Department.

To

The Secretary to the Government of India,
Department of Commerce.

Subject:- False trade description.

Sir,

I am directed to refer to the Government of India, Department of Commerce, letter No. 304-Ind(1)/42, dated the 13th October 1942, on the above subject, and to forward extract paragraphs 2 to 4 of a memorandum from the Director of Industries, Bombay, No.C.I.I.s-5/125 dated the 27th January 1943, and its relevant accompaniments, from which it will be seen that the Australian Dairy Company, Bombay, is not willing to abandon the label used by it on its butter in favour of another label.

I am also to forward extracts from the opinions of the Remembrancer of Legal Affairs, Bombay, No. 1496, dated the 27th February 1943, and No.2730, dated the 14th April 1943, and to inquire whether in view of his opinion, the Government of India still desire that action should be take against the Company. The Government of Bombay may also be informed whether prosecution against the Company should be launched by it or whether the Australian Government Trade Commissioner in India should be left to take such action as he desires.

3. The label in question is returned herewith for reference.

Your obedient servant,
Sd/- C.K.Maru.
For Chief Secretary to the Government of Bombay,
Political and Services Dept.

P.T.O.

No. 4484/34-B

Political and Services Department,

Bombay Castle, 14th May 1943.

Copy is forwarded with compliments to:-

The Director of Industries, Bombay,
The Remembrancer of Legal Affiars,

for information.

By order of the Governor of Bombay,

Sd/-

For Chief Secretary to the Government

of Bombay,

Political and Services Department.

C.G.R. 9-7-

C 5